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Filing date: **12/08/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85849482
Applicant	PumpTek Asia Limited dba PumpTek
Applied for Mark	DRIVETEK
Correspondence Address	SUNISHA S CHOKSI LAW OFFICE OF SUNISHA S CHOKSI 123 NORTH POST OAK LANE, SUITE 405 HOUSTON, TX 77024 UNITED STATES trademarks@choksilaw.com
Submission	Appeal Brief
Attachments	Applicant's Appeal Brief_DRIVETEK.pdf(2500511 bytes)
Filer's Name	Sunisha S. Choksi
Filer's e-mail	trademarks@choksilaw.com
Signature	/ssc/
Date	12/08/2014

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

.....
In re Application of:

Name: PumpTek Asia Limited
DBA PumpTek

Law Office: 105

Serial No.: 85/849,482

Filed: February 14, 2013

Trademark Attorney:
Maureen Dall Lott

Trademark: DRIVETEK
.....

Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT-APPELLANT'S APPEAL BRIEF

INTRODUCTION

Pursuant to a Notice of Appeal filed with the Trademark Trial and Appeal Board on July 8, 2014, the Applicant-Appellant PumpTek Asia Limited, a Hong Kong Limited Liability Company doing business as PumpTek (hereinafter, the "Applicant"), hereby appeals the Examining Attorney's denial of Applicant's Request for Reconsideration dated August 7, 2014, to register the above-identified Trademark. Applicant respectfully requests the Trademark Trial and Appeal Board (hereinafter, the "Board") to reverse the Examining Attorney's decision on the ground that the Applicant's mark does not create a likelihood of confusion with the mark cited by the Examining Attorney, under Trademark Act Section 2(d), 15 U.S.C. §1052(d). In addition, the Applicant respectfully requests the Board to reverse the Examining Attorney's decision on the ground that the Applicant's Trademark merely describes a feature of the Applicant's goods, under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

STATEMENT OF FACTS

A. February 14, 2013; The Applicant filed the Initial Application with the USPTO.

The Applicant seeks to register its Trademark DRIVETEK (as a standard character mark) on the Principal Register, which was filed on an “Intent to Use” basis under Section 1(b) of the Trademark Act (hereinafter, the “Applicant’s Trademark”). The identification of goods has been amended, and is currently described as “variable speed drives for use with fluid pumping systems in oil and gas exploration, drilling and production” in International Class 07.

B. June 7, 2013; The Examining Attorney Issued a First Office Action.

- At the time of the first Office Action, Applicant’s identification of goods was listed as “variable speed drives for use with fluid pumping systems”.
- The Examining Attorney refused the registration of Applicant’s Trademark because of an alleged likelihood of confusion with following U.S. registrations based on the Examining Attorney’s contention that the Applicant’s Trademark is similar to each cited mark, and that the Applicant’s goods are related to each of Registrants’ goods and/or services noted below:
 - U.S. Registration No. 1,669,332, for the mark “DRIVETECH” for land vehicle parts, namely, constant velocity joints, half shaft assemblies and constant velocity boot kits. Hereinafter, referred to as “the ‘332 Registration”, and
 - U.S. Registration No. 4,040,389, for the mark “VULKAN DRIVE TECH” (stylized):

VULKAN
DRIVE TECH

for goods including machine couplings and transmission components except for land vehicles; machine couplings other than for land vehicles; machine couplings, except for land vehicles; clutches for machines and other than for land vehicles; brake parts, other than for land vehicles, namely, brake units and brake pads; couplings, namely, shaft

couplings for land vehicles; clutches for land vehicles; drive shafts for land vehicles; brake parts for vehicles, namely, brake units and brake pads. Hereinafter, referred to as “the ‘389 Registration” or the “Cited Registration”.

- The Examining Attorney also referenced prior pending U.S. Application Serial No. 79/125,932, for the mark “FLENDER TECDRIVE” for motors and engines except for land vehicles; Machine coupling and transmission components except for land vehicles. Hereinafter, referred to as the ‘932 Application.
- Lastly, the Examining Attorney refused registration of the Applicant’s Trademark because of an alleged claim that the Applicant’s Trademark merely describes a feature of Applicant’s goods.

C. December 9, 2013; The Applicant Responded to the First Office Action.

The Applicant amended the identification of goods to “variable speed drives for use with fluid pumping systems in oil and gas exploration, drilling and production”, and informed the Examining Attorney that the Registrant of the ‘332 Registration failed to file the required post-registration maintenance filings within its window of time to file such filings or within its allotted grace period; therefore the grounds to refuse to register the Applicant’s Trademark in light of this specific cited registration was moot. The Applicant also argued the following:

- The Applicant’s Trademark, when viewed in its entirety, is not similar to the marks in the ‘389 Registration and the ‘932 Application in sound, appearance or overall commercial impression.
 - The Applicant’s Trademark, DRIVETEK, is a one-word, two syllable mark starting with the letter “D”;
 - The mark of the ‘389 Registration Cited Mark is a three word, four-syllable mark starting with the letter “V”; and
 - The mark of the ‘932 Application is a two word, four-syllable mark starting with the letter “F”.

- The Applicant's goods, as amended, and the goods recited in the '932 Application and in the '389 Registration are dissimilar and unrelated, are sold through different channels of trade and markets, and are ultimately sold to highly sophisticated customers.
- Furthermore, the Applicant asserted that Applicant's Trademark is an inherently distinctive, suggestive unitary coined mark, and not merely descriptive of Applicant's goods. Applicant's Trademark does not immediately describe a feature of Applicant's goods.

D. January 8, 2014; The Examining Attorney Issued a Final Office Action.

The Examining Attorney withdrew her rejections to register the Applicant's Trademark in light of the '332 Registration and the '932 Application. The Examining Attorney, however, continued and made final her refusal to register the Applicant's Trademark because of an alleged likelihood of confusion with the mark in the '389 Registration under Section 2(d) of the Trademark Act, and because of an alleged claim that the Applicant's Trademark merely describes a feature of Applicant's goods, under Section 2(e)(1) of the Trademark Act.

E. July 8, 2014; The Applicant Filed a Request for Reconsideration After a Final Office Action & Filed a Notice of Appeal concurrently therewith.

Applicant responded to the Final Office Action and argued that consumer confusion was unlikely due to dilution & co-existence of many "drive" formative marks and "tek" or "tech" formative marks. Small distinctions between such marks are sufficient to avoid likelihood of confusion, and the Applicant further argued that the '389 Registration should be entitled to the narrowest scope of protection. The Applicant supported this finding by citing and submitting a number of third party registrations.

G. August 7, 2014; The Examining Attorney Denied the Applicant's Request for Reconsideration.

Applicant's submitted third party registrations were not convincing evidence as to the lack of confusion between the Applicant's Trademark and the Cited Registration. The Examining Attorney continued to refuse registration of Applicant's Trademark on the basis that the marks are similar, particularly referencing that the Applicant's Trademark in standard characters and that the word elements "DRIVE

TECH” of the ‘389 Registration is a large portion of the cited mark. In addition, the Examining Attorney supported her finding regarding the relatedness of Applicant's goods and Registrant's goods on the presumption that each party's respective goods are sold through the same channels of trade to the same classes of purchasers. This presumption was based on references to Internet evidence of various third party web sites and third party registrations regarding similar goods and/or services to the Applicant and Registrant of the ‘389 Registration. Lastly, the Examining Attorney continued to refuse registration of the Applicant's Trademark because of an alleged claim that the Applicant's Trademark merely describes a feature of Applicant's goods, under Section 2(e)(1) of the Trademark Act.

G. Current Status of the ‘389 Registration.

- The word elements "DRIVE TECH" are disclaimed in the registration.
- Since the filing of this Appeal, the ‘389 Registration was modified by the Registrant on November 11, 2014, and the goods in International Class 07 are now as follows: “Machine couplings and transmission components except for land vehicles; machine couplings other than for land vehicles, machine couplings for generators, machine couplings for wind generator plants; machine couplings, except for land vehicles; clutches for machines and other than for land vehicles; * shaft couplings for machines; transmission shafts, other than for land vehicles; * brake parts, other than for land vehicles, namely, brake units and brake pads.”

ARGUMENT

I. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN THE APPLICANT'S TRADEMARK AND THE MARK OF THE ‘389 REGISTRATION.

Determining whether there is a likelihood of consumer confusion between two marks is a question of fact based on an analysis of all the probative facts in evidence, and “[t]here is no litmus rule which can provide a ready guide to all cases”. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (hereinafter, “DuPont”); see also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Not all of the DuPont factors may be relevant or of equal

weight in a given case, and “any one of the factors may control a particular case,” *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 1406–07, 41 USPQ2d 1531, 1533 (Fed.Cir.1997).

Applicant respectfully states that the Applicant’s Trademark, as applied to the amended goods, as currently set forth in the underlying Application, will not cause confusion with the mark of the Cited Registration as applied to the goods identified in said registration based on the following DuPont factors:

- Due to the nature of Applicant’s goods, the buyers of Applicant’s goods are extremely careful, sophisticated purchasers; and
- The word elements “DRIVE TECH”, in the Cited Registration, are weak word elements, and based on prior precedent, should entitled to a very narrow scope of protection.

A. Due to the Nature of Applicant’s Goods and Registrant’s Goods, Consumers are Knowledgeable, Careful, and Sophisticated Purchasers

The Applicant amended the Applicant’s goods in response to the Examining Attorney’s First Office Action by adding the limitation “...in oil and gas exploration, drilling and production”. Applicant, by limiting its goods to “variable speed drives for use with fluid pumping systems in oil and gas exploration, drilling and production”, limited the channels of trade and the potential purchasers who may encounter both Applicant’s Trademark and the mark of the ‘389 Registration. In these limited overlapping channels of trade, consumers who are highly knowledgeable in the field of oil and gas exploration, drilling and production, and will likely purchase the Applicant’s expensive goods for particular application in this industry after careful review and consideration.

The goods listed in the ‘389 Registration have been recently amended; there is now a limitation to some of the goods for use in wind generator plants which is unrelated to the oil and gas industry. Regardless, consumers of Applicant’s goods and the goods of the Cited Registration are discriminating, highly selective consumers due to the nature and description of goods currently referenced in the Application and the ‘389 Registration.

“Where the purchasers are the same, their sophistication is important and often dispositive because [s]ophisticated consumers may be expected to exercise greater care.” *See Electronic Design &*

Sales, Inc. v Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992), quoting *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489, 212 USPQ 246, 252 (1st Cir. 1981). As stated in an analogous case:

“In this regard, we further note that the respective goods of the parties are sophisticated medical equipment which would be selected with great care by purchasers familiar with the source or origin of the products. *See In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985). Buyers of the parties' goods, as well as potential customers for the products, plainly are highly educated, sophisticated purchasers who know their equipment needs and would be expected to exercise a great deal of care in its selection.” *See Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390, 1396 (TTAB 1991).

Confusion is even further reduced in this case because Applicant's prospective customers are sophisticated commercial purchasers who do not make purchasing decisions lightly, but rather employ careful considerations in making their decisions. Such purchasers, in deciding whether to purchase Applicant's goods will not be confused as to the source of the respective goods or services. *See Dynamics Research Corp. v. Langenau Mfg. Corp.*, 217 U.S.P.Q. 649 (Fed. Cir. 1983), in which the court held that consumers would not be confused by the identical mark for unrelated goods even where there existed a strong possibility that such purchasers could encounter both marks (in advertisements in a trade publication). *See also Electronic Design & Sales, Inc.*, 21 U.S.P.Q. 2d at 1392 (sophistication of the purchasers a factor in concluding no likelihood of confusion). The sophistication of the prospective consumers further removes Applicant's Trademark from likelihood of confusion with the Cited Marks, and the refusal to register should be withdrawn.

Due to the nature of the goods offered by the Applicant, Applicant's prospective customers will be highly discriminating in their purchases. These goods have a higher cost, higher capital investment, and require specialized efforts to manufacture in comparison to the goods of the Cited Registration. Therefore, prospective customers of Applicant's goods would be careful about where these expensive goods are procured and purchased.

B. The Word Elements “DRIVE TECH” of the ‘389 Registration Mark is Merely Descriptive of Registrant’s Goods, therefore are Weak Elements and Entitled to a Narrow Scope of Protection.

Applicant asserts that the word elements “DRIVE TECH” of the ‘389 Registration mark are merely descriptive of Registrant’s goods, due to the fact that these specific word elements are disclaimed in the ‘389 Registration. *See a copy of the TARR print out for the ‘389 Registration dated August 6, 2014, included as Attachment 1 of the Examining Attorney’s Denial of Applicant’s Request for Reconsideration of a Final Office Action.*

As referenced in TMEP Section 1213, “[a] disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark in a trademark application or registration.” More expressly, the significance of a disclaimer is that “no rights are being asserted in the disclaimed component standing alone.” See TMEP Section 1213, *citing, Sprague Electric Co. v. Erie Resistor Corp.*, 101 USPQ 486, 486-87 (Comm’r Pats. 1954).

The Examining Attorney has continually focused on the similarity of the word elements “DRIVE TECH” of the ‘389 Registration and Applicant’s Trademark in her Office Actions and Denial of the Applicant’s Request for Reconsideration, however the cited mark must be assessed as a whole, composite mark, including the word element “VULCAN”. As the Applicant stated in the Applicant’s Response to the First Office Action, “[a] mark should not be split into its component parts and each part then compared with the parts of the conflicting mark. *See, Colgate-Palmolive Co. v. Carter-Wallace Inc.*, 167 U.S.P.Q. 529 (C.C.P.A. 1970).

In *In re Hearst Corp.*, 982 F.2d 493, 25 U.S.P.Q.2d 1238 (Fed. Cir. 1992), the court found that the Board had erred in holding that there was a likelihood of confusion between VARGAS and VARGA GIRL, both for use on calendars, stating that although “Vargas” and “Varga” were similar, “the marks must be considered in the way they are used and perceived...and all components thereof must be given appropriate weight.” The court went on to say that “[b]y stressing the portion ‘varga’ and diminishing the portion ‘girl’, the Board inappropriately changed the mark.” *In re Hearst Corp.*, 25 U.S.P.Q. 2d at 1239, *see also Lever Brothers Co. v. Barcolene Co.*, 174 U.S.P.Q. (C.C.P.A. 1972) (ALL CLEAR not likely to

TTAB

cause confusion with ALL, both for household cleaning products); Colgate-Palmolive, 167 U.S.P.Q. at 530–531 (PEAK for deodorant not likely to be confused with PEAK PERIOD for deodorant).

The Applicant urges the Board not to diminish value of the word element “VULCAN” in the ‘389 Registration, and to not to dissect Applicant’s suggestive Trademark when assessing the registrability of the mark, since they both are sufficiently distinctive to co-exist on the Principal Register as applied to their respective goods.

As stated in Applicant’s Response to the Office Action, “To apply the “descriptiveness label” to Applicant’s entire mark is to over estimate the consumer’s thought process by assuming that they will, upon seeing DRIVETEK, immediately understand that DRIVETEK identifies some feature of the Applicant’s goods. Because Applicant’s mark, in its entirety, does not immediately describe Applicant’s goods, it is suggestive; in that some imagination, thought and perception is required to reach a conclusion as to some property of the goods. *See Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 160 U.S.P.Q. (BNA) 777 (S.D. N.Y. 1968).

Furthermore, as referenced in TMEP Section 1207.01(b)(ix), “The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that merely descriptive and weak designations may be entitled to a narrower scope of protection than an entirely arbitrary or coined word. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1026 (TTAB 2009); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1957-58 (TTAB 2006); and *In re Cent. Soya Co.*, 220 USPQ 914, 916 (TTAB 1984).

In light of the discussion and the descriptive nature of the word elements “DRIVE TECH” in the ‘389 Registration, the Applicant asserts that the ‘389 Registration’s must be reviewed as the whole, composite mark, VULCAN DRIVE TECH (& DESIGN), and should be entitled to a very narrow scope of protection. The Applicant’s use of its Trademark in conjunction with its goods should not to be denied registration on the Principal Register on the basis of the similarity of the marks at issue.

II. APPLICANT'S TRADEMARK DOES NOT MERELY DESCRIBE A FEATURE OF APPLICANT'S GOODS.

A term is merely descriptive of goods within the meaning of Section 2(e)(1) of the Trademark Act, if the term *immediately conveys* an idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods at issue. *See In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978); *see also In re Tower Tech Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002); *see also In re Patent and Trademark Services, Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

The Applicant respectfully disagrees with the Examining Attorney's assertion that the Applicant's Trademark, DRIVETEK, merely describes the nature of Applicant's goods. Applicant contends the evidence is not sufficient to prove that the mark DRIVETEK directly and immediately conveys information about the character, quality, or features of the Applicant's goods.

Though the word element "DRIVE" does appear in the identification of Applicant's goods, the Applicant believes that the Examining Attorney has erred in asserting that the word element "TEK" is a misspelling of "TECH" and refers to "technology", which was referenced in both the First Office Action and the Final Office Action

Applicant requests that the Board take judicial notice of the dictionary definition of the term "tech" and "technician", which is included herein as Exhibit A and Exhibit B, respectively. These definitions were retrieved from Merriam Webster's online dictionary at <http://www.merriam-webster.com/dictionary/>. Clearly, the word element "TECH", which is an equivalent to the word suffix "-TEK" in the Applicant's Trademark, refers to a "technician" who is defined as:

1. A **person** whose job relates to the practical use of machines or science in industry, medicine, etc.; or
2. **Someone who has mastered** the basic techniques or skills in a sport, an art, etc.

During the prosecution of the subject Application, the Examining Attorney also included a copy of a web printout with the definition of the term "tech" from the website at <http://dictionary.infoplease.com> that clearly lists a definition of "tech" as "technician". Thus, the Applicant contends that Applicant's use of the word element "TEK" suggests an expertise or mastery of a person skilled in a particular field, and not the Examining Attorney's suggestion that the word element

“TEK” means the word “technology”, which she argues describes the nature or manner of how Applicant’s goods were developed.

The fact that the term “technician” refers to a person and not a machine clearly supports that argument that the use of the word element “TEK” in conjunction with Applicant’s goods is a nonsensical use of the term. At best, the Applicant’s composite mark, DRIVETEK, is a suggestive term which suggests, rather than describes, the Applicant’s goods; imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. *See In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Based on the record herein, the Applicant states that the composite mark DRIVETEK is used to identify the goods in the subject Application, specifically “variable speed drives for use with fluid pumping systems in oil and gas exploration, drilling and production”, but does not immediately impart with any degree of particularity information about the goods. The suggestive mark DRIVETEK possesses enough incongruity or creativity to raise doubts as to whether it is merely descriptive because its meaning would not be grasped without some measure of imagination and thought.

Applicant’s suggests that the Examining Attorney has not met the burden of proof that consumers would otherwise immediately understand and attribute a specific meaning to the term TEK in connection with “variable speed drives for use with fluid pumping systems in oil and gas exploration, drilling and production”. To identify Applicant’s goods, customers and purchaser would have to use some level of thought to make the connection between the Applicant’s Trademark and the quality or characteristic the Applicant’s Trademark is supposed to describe.

There is often a thin line separating merely descriptive from suggestive terms. At the very least, doubts about the “merely descriptive” character of the mark should be resolved in Applicant’s behalf. *See In re Rank Organization Ltd.*, 222 USPQ 324, 326 (TTAB 1984); *In re Pennwalt Corp.*, 173 USPQ 317 (TTAB 1972) (“DRI-FOOT” for antiperspirant foot deodorant); and *In re Ray J. McDermott and Co., Inc.*, 170 USPQ 524 (TTAB 1971) (“SWIVEL-TOP” for fuel transfer mooring buoys).

CONCLUSION

For the reasons set forth hereinabove and in Applicant's Response to the First Office Action, dated December 9, 2013, as well as in Applicant's Request for Reconsideration After a Final Office Action, dated July 8, 2014, Applicant submits that there is no likelihood of confusion, mistake or deception between Applicant's Trademark and the '389 Registration. In addition, the Trademark does not merely describe a feature of the Applicant's goods. Accordingly, Applicant's Trademark is entitled to registration.

The Board is therefore respectfully requested to reverse the Examining Attorney's decision refusing registration of Applicant's Trademark.

Respectfully submitted,

Applicant-Appellant

By:  _____

Sunisha S. Choksi
Counsel for Applicant- Appellant,
Name: PumpTek Asia Limited
DBA PumpTek

Address:
123 North Post Oak Lane, Suite 405
Houston, Texas 77024
Phone: (713) 640-5933
Fax: (713) 481-0844
E-mail: trademarks@choksilaw.com

Dated: December 6, 2014

EXHIBIT A



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'tech *noun* \ˈtek\

Definition of TECH

: TECHNICIAN <lab techs> <a computer tech>

First Known Use of TECH

1942

*tech *noun, often attributive*

Definition of TECH

: TECHNOLOGY <the triumph of tech...is far from complete — Newsweek>

First Known Use of TECH

1972

*tech *abbreviation*

Definition of TECH

- 1 technical; technically
- 2 technological

tech *abbreviation* (Medical Dictionary)

Medical Definition of TECH

technician

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Webster's Dictionary of 1864

Old-School Grammar

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He really has a "tech" for these situation. In an online quiz.
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Jill Miller · MLT at Hospital
Ability to do something
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Macleo White · West Charlotte High School
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EXHIBIT B



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technician

4 ENTRIES FOUND:

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clerical technician
dental technician

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tech-ni-cian *noun* \tek-'ni-shən\

: a person whose job relates to the practical use of machines or science in industry, medicine, etc.
: someone who has mastered the basic techniques or skills in a sport, an art, etc.

Full Definition of TECHNICIAN

- 1 : a specialist in the **technical** details of a subject or occupation <a computer **technician**>
- 2 : one who has acquired the **technique** of an art or other area of specialization <a superb **technician** and a musician of integrity — Irving Kolodin>

See **technician** defined for English-language learners »
See **technician** defined for kids »

Examples of TECHNICIAN

- They hired a **technician** to help maintain the office's computers.
- She is the lighting **technician** for the play.
- As a painter, he was more than just a **technician**; he was a creative genius.

First Known Use of TECHNICIAN

1833

Other Job Terms

factotum, milliner, ostler, scrivener, tinker, webster, wordsmith

Rhymes with TECHNICIAN

addition, admission, ambition, attrition, audition, beautician, clinician, cognition, colition, commission, condition, contrition, demissio...
[+] more

tech-ni-cian *noun* \tek-'nish-an\
(Medical Dictionary)

Medical Definition of TECHNICIAN

: a specialist in the technical details of a subject or occupation <a medical **technician**>

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'Hipster,' 'Rap,' and More
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